ICO call for views on a direct marketing code of practice

The Information Commissioner is calling for views on a direct marketing code of practice.

The Data Protection Act 2018 requires the Commissioner to produce a code of practice that provides practical guidance and promotes good practice in regard to direct marketing.

While direct marketing is an important and useful tool to help organisations engage with people in order to grow their business or to publicise and gain support for their causes, it can also be intrusive and have a negative impact on people if done badly. This can cause reputational damage to organisations and, in some cases, result in fines or other regulatory action for breaking data protection laws.

So it is important that organisations ensure their marketing activities are compliant with data protection legislation (the General Data Protection Regulation and Data Protection Act 2018) and, where necessary, the Privacy and Electronic Communications Regulations 2003 (PECR).

We have previously published detailed direct marketing guidance. The new code will build on that guidance and address the aspects of the new legislation relevant to direct marketing such as transparency and lawful bases for processing, as well as covering the rules on electronic marketing (for example emails, text messages, phone calls) under PECR.

The European Union is in the process of replacing the current e-privacy law (and therefore PECR) with a new ePrivacy Regulation (ePR). However the new ePR is yet to be agreed and there is no certainty about what the final rules will be. Because of this we intend for the direct marketing code to only cover the current PECR rules until the ePR is agreed. Once the ePR is finalised and the UK position in relation to it is clear we will produce an updated version of the code which takes this into account as appropriate.

This call for views is the first stage of the consultation process. The Commissioner is seeking input from relevant stakeholders, including trade associations, data subjects and those representing the

interests of data subjects. We will use the responses we receive to inform our work in developing the code.

You can email your response to directmarketingcode@ico.org.uk

Or print and post to:

Direct Marketing Code Call for Views
Engagement Department
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

If you would like further information on the call for views, please email the Direct Marketing Code team.

Please send us your views by **24 December 2018**.

Privacy statement

For this call for views we will publish responses received from organisations but will remove any personal data before publication. We will not publish responses from individuals. For more information about what we do with personal data please see our privacy notice.

Questions

Q1 The code will address the changes in data protection legislation and the implications for direct marketing. What changes to the data protection legislation do you think we should focus on in the direct marketing code?

Further clarity on the application of the three-stage legitimate interests assessment to different marketing scenarios, to enable clearer advice to be given. For example, the scenarios in which "reasonable expectation" would be considered satisfied, and the circumstances in which an opt-out from use of data for marketing would be necessary (not for the purposes of a PECR soft opt-in, but rather to satisfy the balancing test of an LIA).

The practical application of the Article 14 fair processing notice requirement to data obtained by controllers from third party data brokers, or where publicly available information is obtained directly from web sources e.g. LinkedIn.

Q2 Apart from the recent changes to data protection legislation are there other developments that are having an impact on your organisation's direct marketing practices that you think we should address in the code?

☐ Yes

☒ No

Q3 If yes please specify

Not applicable – this response is submitted by a committee of data protection lawyers, not a controller carrying out marketing.

Q4 We are planning to produce the code before the draft ePrivacy Regulation (ePR) is agreed. We will then produce a revised code once the ePR becomes law. Do you agree with this approach?

☒

Yes

☐ No

Q5 If no please explain why you disagree

Q6 Is the content of the ICO's existing direct marketing guidance relevant to the marketing that your organisation is involved in?

☐ Yes

☒ No

Q7 If no what additional areas would you like to see covered?

Not applicable – this response is submitted by a committee of data protection lawyers, not a controller carrying out marketing.

Q8 Is it easy to find information in our existing direct marketing guidance?

☒ Yes

☐ No

Q9 If no, do you have any suggestions on how we should structure the direct marketing code?

Q10 Please provide details of any case studies or marketing scenarios that you would like to see included in the direct marketing code.

1. Please provide more clarity and further examples around what it means to "instigate" communications (and therefore who has responsibility for compliance in relation to communications that are sent to recipients). The ICO's website currently cites an example where a controller uses a contractor to contact third parties. In that case, it is clear that the instructing controller should be responsible for the communication (as well as the contractor in some cases). However, more nuanced guidance on the factors used to determine "instigation" would be welcome, to make it easier to allocate responsibility.

For example, a company provides a service to potential hosts of parties at which the company's products are offered to party guests. In this case, the host can use their own private database of contacts to communicate invitations to their friends to attend the party as guests. The company facilitates this, and the objective is to have its products marketed at the party (usually by a sales consultant it sends to the party), but it has not collected the guests' contact details at this point. By offering the service to the host, is the company "instigating" the communications? If so, how can the company obtain consents from the guests if it has not collected their contact details? Does the company have to rely upon the host (a private individual) to obtain appropriate third party consents in favour of the company? How could the host do this in practice? In relying on the host, how would the company be able to demonstrate consent as required by Art.7(1) of GDPR?

On a similar point, it would be very helpful to have greater clarity on the acceptable boundaries for "refer a friend" viral marketing.

2. Clarification regarding the extent to which active consent to a privacy policy can constitute valid consent (a sufficiently clear and affirmative action) to marketing activities referred to in that policy.

For example, conference organisers may state in their privacy policy for attendees that, by allowing an exhibitor to scan their conference badge, the attendee is indicating their consent to receive marketing emails from that exhibitor. They then obtain consent to the privacy policy.

Would this be considered a sufficiently clear, affirmative action, if

the privacy policy has been agreed to? Arguably, this is not sufficiently specific or clear.

3. Clarity as to whether the "sale of a product or service" limb of the 'soft opt in' in PECR can be satisfied in situations where an organisation's service (Organisation A) is provided free to consumers (e.g. an app or online service) but funded by third parties (e.g. third party advertising, or a third party organisation who pays for its services to be on the site). In other words, does the 'sale' need to be a direct (monetary) sale paid by the customer or would it cover, say, the offering of a price comparison site or free app where funded by other means.

4. Can 'similar goods or services' for the purposes of the PECR soft opt-in include the marketing of a third party's goods or services where those goods or services are provided as part of the collecting organisation's service. For example, could a bank market a feature of one of its banking products comprised of extras offered by third parties (e.g. discounts at retailers, car breakdown cover etc.) to customers who held other banking products with them. To what extent are the following determinative:

(a) whether the service is provided by the bank, but sub-contracted to a third party provider, or whether the bank refers the customer directly to the third party provider, perhaps in return for commission;

(b) the extent to which the services offered are sufficiently similar to the core services of the bank (even if the service is a direct service of the bank, albeit sub-contracted to the provider).

5. Confirmation that organisations who may not have been required to seek consent (due to the application of soft-opt in and legitimate interests ground or which already had GDPR standard valid consent) but who sought to obtain fresh consent of individuals on its marketing databases prior to 25 May can no longer contact individuals who did not consent.

6. The extent to which intra-group data-sharing for analytics and cross-brand business intelligence, and in order to obtain a single customer view, might be considered acceptable using legitimate interests. Whilst marketing e-mails by one brand to the customers of an affiliate's brand would face a tougher analysis, in what circumstances could cross-brand analytics be justified using legitimate interests?

Q11 Do you have any other suggestions for the direct marketing code?

- Clearer/more discussion around the sale and purchase of marketing lists as part of a business sale.
- Practical guidance on how organisations should check against the TPS/ CTPS (How often are you supposed to do this? Every time you make a marketing call?)
- The consent guidance suggests refreshing consents regularly – how should this be done in practice?
- Provision of clear (updated) marketing consent examples, particularly illustrating different mechanics for demonstrating a clear, affirmative action.
- Clarity about how to comply with Art.21(4) i.e. what is required to ensure that the right to object to marketing is "explicitly" brought to the attention of the data subject, and what would satisfy the requirement to ensure that the information is presented "clearly and separately" from other information.
- Further examples to clarify what constitutes "marketing". For example, if a company invites its clients to an event to promote diversity, it is not promoting the products and services of the company. However, would this constitute marketing on the basis that the company is promoting itself and its values generally? Similarly, newsletters and press releases to journalists can cause uncertainty.

About you

Q12 Are you answering these questions as?

- ☐ A public sector worker
- ☐ A private sector worker
- ☐ A third or voluntary sector worker
- ☐ A member of the public
- ☐ A representative of a trade association
- ☐ A data subject

☐	An ICO employee
X	Other

If you answered 'other' please specify:

City of London Law Society Data Law Committee.

The City of London Law Society ("CLLS") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

This response has been prepared by the CLLS Data law Committee.

ico.
Information Commissioner's Office

Q13 Please provide the name of the organisation that you are representing.

As above

Q14 We may want to contact you about some of the points you have raised. If you are happy for us to do this please provide your email address:

[redacted]

Thank you for taking the time to share your views and experience.